Response Requested

ORIGINAL

No. 02-6683 (3)

Supreme Court, U.S.
FILED
DEC 26 2002
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

HERNAN O'RYAN CASTRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

MICHAEL CHERTOFF
Assistant Attorney General

NINA GOODMAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

15 pp

QUESTION PRESENTED

Whether the district court correctly dismissed petitioner's motion to vacate his sentence under 28 U.S.C. 2255 because it was a second or successive Section 2255 motion.

IN THE SUPREME COURT OF THE UNITED STATES

No. 02-6683

HERNAN O'RYAN CASTRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A at 1-13) is reported at 290 F.3d 1270.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 2002. A petition for rehearing was denied on July 5, 2002. The petition for a writ of certiorari was filed on October 1, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1992, following a jury trial in the United States District Court for the Southern District of Georgia, petitioner was convicted of conspiracy to possess with the intent to distribute and to distribute cocaine, in violation of 21 U.S.C. 846, and

conspiracy to import cocaine, in violation of 21 U.S.C. 963. Pet. App. F1, Exhibit A (Judgment) at 1. He was sentenced to 240 months' imprisonment. Id. at 2. The court of appeals affirmed, United States v. Taylor, 17 F.3d 333 (11th Cir. 1994), and this Court denied certiorari. Castro v. United States, No. 94-5623, 513 U.S. 950 (1994).

2. On July 11, 1994, petitioner filed a pro se motion for a new trial pursuant to Federal Rule of Criminal Procedure 33. Pet. App. A at3; Pet. App. F1. He argued, among other things, that an immunity agreement entered into by a witness who testified at his trial constituted newly discovered evidence that the government had failed to disclose in violation of Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972). Pet. App. F1 at 7-18. The government's response to the new trial motion stated that petitioner's claim of a "Brady/Giglio violation is more properly cognizable under a motion pursuant to 28 U.S.C. § 2255," but that because "such a motion may be filed at any time, the government has no objection to [petitioner's] motion for new trial being considered as demanding relief under both Rule 33 and 28 U.S.C. § 2255." Pet. App. A at 3; Pet. App. F2 at 7. Petitioner filed a reply to the government's response, in which he argued that his motion was properly filed under Rule 33. Pet. App. A at 3; Pet. App. F3 at 2.

The district court denied the new trial motion. Pet. App. B3 at 1-8. The court noted that the government had asserted that it had no objection to the motion "being treated as demanding relief

under both Rule 33 and 28 U.S.C. § 2255," and stated that it would therefore "consider [petitioner's] motion as requesting both kinds of relief." Id. at 3. With respect to petitioner's claim that the government improperly failed to disclose a witness's immunity agreement, the court concluded that because "[a]ny impeaching effect from the immunity agreement would have been minimal," there was no reasonable probability that disclosure of the agreement would have affected the outcome of petitioner's trial. Id. at B5.

The court of appeals affirmed in an unpublished per curiam order. Pet. App. B4 at 1-2. The court stated that petitioner's appeal was "from the denial of relief in regard to a combined motion to vacate, set aside or correct sentence, 28 U.S.C. § 2255, and motion for new trial, Fed. R. Crim. P. 33," and it affirmed "for the reasons set forth" by the district court. Pet. App. B4 at 2.

3. On April 22, 1997, petitioner filed a motion for collateral relief under 28 U.S.C. 2255, claiming, among other things, that his trial counsel rendered constitutionally ineffective assistance by failing to file a motion to suppress statements that petitioner made after his arrest on the ground that the statements were taken in violation of his Sixth Amendment right to counsel. Pet. App. B6 at 2; Pet. App. F4 at 4. The district court denied the Section 2255 motion. Pet. App. B5 at 1-3.

The court of appeals, after granting petitioner a certificate of appealability under 28 U.S.C. 2253 on the ineffective assistance claim, Pet. App. A at 3-4, vacated the district court's order

denying the Section 2255 motion and remanded for further proceedings. Pet. App. B6 at 1-5. On remand, the court stated, the district court should "employ Sixth Amendment analysis" in evaluating petitioner's ineffective assistance claim and "develop more fully the facts surrounding" that claim. Id. at 5. The court of appeals also noted that "there is some question of whether this petition is successive," and it directed the district court to "examine the record to determine" whether petitioner's Section 2255 motion was successive. Ibid.

4. After the remand, the government moved to dismiss petitioner's Section 2255 motion pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, which became effective on April 24, 1996. Pet. App. F6. AEDPA requires any prisoner seeking to file a "second or successive motion" under Section 2255 to first receive certification from the court of appeals that the motion relies on either (1) newly discovered evidence that establishes that no reasonable factfinder would have found the movant guilty of the offense or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. 28 U.S.C. 2255 ¶ 8. The government argued that because petitioner's 1994 new trial motion was treated as a request for collateral relief pursuant to 28 U.S.C. 2255, his current motion was a second or successive motion that had not been authorized by the court of appeals. Pet. App. F6 at 1-5.

A magistrate judge recommended that petitioner's Section 2255

motion be dismissed on the ground that it was a successive motion filed without authorization from the court of appeals. Pet. App. B2. Adopting the magistrate judge's report and recommendation, the district court dismissed the Section 2255 motion as a successive motion. Pet. App. B1. The district court rejected petitioner's claim that the court's recharacterization of his pre-AEDPA new trial motion as a motion under Section 2255, without giving him notice of the potential consequences and an opportunity to amend or withdraw his motion, unfairly barred him from filing a second Section 2255 motion. Id. at 1-3. The court noted that the government's response to the new trial motion put petitioner on notice of the recharacterization, and that petitioner "never objected to the characterization of his motion as one under § 2255." Id. at 2; see Pet. App. B2 at 3-4 ("Petitioner did not object to the Government's suggestion that his motion be construed as one under Rule 33 and 28 U.S.C. § 2255."). The court also noted that pre-AEDPA law would have prohibited petitioner from filing a successive Section 2255 motion raising claims of which he was aware when he filed the first motion, and that petitioner therefore "may have known of the consequences of having his motion for a new trial construed as a § 2255 motion." Pet. App. B1 at 2-3. The district court granted petitioner a certificate of appealability on the issue of whether petitioner's Section 2255 motion was successive.

---

[1] The magistrate judge also conducted an evidentiary hearing on petitioner's ineffective assistance claim, but the recommendation did not address the merits of that claim. Gov't C.A. Br. 2 n.1.

Gov't C.A. Br. 3.

5. The court of appeals initially vacated the district court's dismissal of petitioner's Section 2255 motion, ruling that the motion could not properly be treated as successive. Pet. App. B8. Subsequently, the court of appeals, acting sua sponte, withdrew its original opinion and substituted a revised opinion affirming the district court's judgment. Pet. App. A at 1-11. The court observed that "Congress, in enacting the AEDPA, imposed further restrictions on a prisoner's ability to file a second § 2255 petition," and it concluded that "to relieve an entire class of petitioners from any restriction at all on the filing of a second motion simply because their first motions had been recharacterized * * * might undermine the congressional purpose behind the AEDPA, which is to limit successive § 2255 petitions." Id. at 8-9. The court stated, however, that it shared the "substantial fairness concerns" of other courts of appeals, and it "urge[d]" district courts in future cases to "warn petitioners of the consequences of the recharacterization of their filings as § 2255 petitions." Id. at 11; see id. at 2 ("[I]n the future, when a district court unilaterally recharacterizes a prisoner's pleading as a § 2255 petition, the judge should also warn the prisoner * * * that this recharacterized petition may be his first and only chance to seek relief under § 2255.").

Judge Roney dissented, arguing that other courts of appeals had correctly held that a postconviction motion that is recharacterized by the district court as a motion under Section

2255 "ordinarily will not count as a first petition" for purposes of applying AEDPA's limitations on second or successive Section 2255 motions. Pet. App. A at 12-13.

ARGUMENT

Petitioner contends (Pet. 16-27) that this Court should grant review to resolve a conflict among the courts of appeals concerning whether a Rule 33 new trial motion or other postconviction motion that is recharacterized as a motion filed under 28 U.S.C. 2255 counts as an initial Section 2255 motion for purposes of determining whether a subsequent motion is "second or successive." Although petitioner is correct that the courts of appeals are in conflict over that issue, there is no need for this Court to resolve the disagreement.

1. Before enactment of AEDPA, district courts were permitted to construe a prisoner's post-conviction pleadings liberally to determine whether relief was warranted under 28 U.S.C. 2255. See, e.g., Haines v. Kerner, 404 U.S. 519, 520 (1972). At that time, there were very significant limitations on a prisoner's ability to bring a second or successive motion for postconviction relief. See, e.g., McCleskey v. Zant, 499 U.S. 467 (1991) (petition under 28 U.S.C. 2254). The recharacterization of a pleading as a Section 2255 motion thus had the potential to affect a prisoner's ability to bring an additional Section 2255 motion later. AEDPA, however, placed additional limits on a prisoner's ability to bring a second and successive motion. See, e.g., 28 U.S.C. 2255 ¶ 8 (certification by court of appeals necessary before second or

successive motion can be brought). Accordingly, recharacterizing a post-conviction motion as one filed under Section 2255 is now even more likely to have the effect of barring a subsequently filed Section 2255 motion as "second or successive."

In light of AEDPA's additional restrictions on second or successive Section 2255 motions, a majority of the courts of appeals have held that a district court may not recharacterize a post-conviction motion as one made under Section 2255, unless the prisoner is given the opportunity to withdraw the motion or to consent to the recharacterization. See Morales v. United States, 304 F.3d 764, 767 (8th Cir. 2002); United States v. Palmer, 296 F.3d 1135, 1146 (D.C. Cir. 2002); In re Shelton, 295 F.3d 620, 622 (6th Cir. 2002); United States v. Emmanuel, 288 F.3d 644, 649 (4th Cir. 2002); United States v. Kelly, 235 F.3d 1238, 1242 (10th Cir. 2000); United States v. Seesing, 234 F.3d 456, 464 (9th Cir. 2000); United States v. Miller, 197 F.3d 644, 652 (3d Cir. 1999); Adams v. United States, 155 F.3d 582, 584 (2d Cir. 1998). Several courts of appeals have similarly held that if a district court recharacterizes a post-conviction motion as one filed under Section 2255 without following that procedure, the motion does not count as a "first" motion under AEDPA's gatekeeping rules. See United States v. Palmer, 296 F.3d at 1148; In re Shelton, 295 F.3d at 622; Henderson v. United States, 264 F.3d 709, 710-711 (7th Cir. 2001); Raineri v. United States, 233 F.3d 96, 100-101 (1st Cir. 2000). In contrast, the Fifth Circuit, in a decision issued shortly after the enactment of AEDPA, held that a prisoner's motion under Section

2255 had to satisfy AEDPA's gatekeeping requirements for second or successive motions because the district court had previously recharacterized his first post-conviction motion as filed under Section 2255 and "there is nothing else" it could have been. In re Tolliver, 97 F.3d 89, 90 (5th Cir. 1996).

There is, however, no need for this Court to resolve the differences in approach among the courts of appeals. The Eleventh Circuit in this case stated that it "agree[d]" with the other courts of appeals "that a district court should not 'extinguish the petitioner's one clear chance at habeas relief under the AEDPA' without the petitioner's informed consent." Pet. App. A at 9 (quoting Raineri, 233 F.3d at 100). Accordingly, it directed district courts in future cases in which the court has decided to recharacterize an initial postconviction motion as a Section 2255 motion to "warn prisoners of the consequences of recharacterization and provide them with the opportunity to amend or dismiss their filings." Pet. App. A at 9. See also id. at 2, 11. Because the Eleventh Circuit thus effectively adopted, on a prospective basis, the approach mandated by other circuits, the question on which the courts of appeals have disagreed is unlikely to arise in future cases.[2]

---

[2] Although the Fifth Circuit has also held that a postconviction motion that is recharacterized as a Section 2255 motion may be counted as a first motion for purposes of applying AEDPA's gatekeeping requirements, see In re Tolliver, 97 F.3d at 90, that decision was issued shortly after the enactment of AEDPA. We are not aware of any Fifth Circuit decisions employing that rule since Tolliver. If the situation arises again in the Fifth Circuit, that court may well reconsider its ruling in Tolliver in light of the concerns articulated by the Eleventh Circuit in this

2. Further review is also unwarranted in this case because petitioner cannot prevail on his motion under Section 2255 in any event. His primary claim was that his attorney rendered ineffective assistance by failing to move to suppress certain post-arrest statements made by petitioner. He asserted that "after officers read him his Miranda rights, he stated he wished to exercise those rights and such a statement was sufficient to assert his Sixth Amendment right to counsel," since he had been indicted before he was arrested. Pet. App. B7, at 2. In response to the court of appeals' remand, an evidentiary hearing was held before a magistrate judge. The magistrate judge ultimately did not rule on the merits of petitioner's claim, because he determined that, as a preliminary matter, it was barred as a second Section 2255 motion that had not been certified by the court of appeals. See Pet. App. B2. The evidence at the hearing demonstrates, however, that petitioner never invoked his right to counsel after receiving the Miranda warning, but instead waived it by speaking with the officers, and that his claim accordingly must fail. See Patterson v. Illinois, 487 U.S. 285 (1988) (failure to invoke right to counsel after being administered Miranda warning sufficient to waive Sixth Amendment right to counsel, where the defendant had not previously indicated that he wanted the assistance of counsel).

Petitioner submitted a declaration in which he asserted that "I was read the Miranda warning. I expressed my wish to exercise my rights." Evid. Hearing Gov't Exh. 1, at ¶ 5. The police

---

case and the other courts of appeals.

officer who arrested him, however, stated that petitioner "indicated that he was willing to talk to the agents without an attorney present." 9/29/01 Tr. 9. See also ibid. ("He agreed to talk with us. He was very cooperative.").

When he testified, petitioner confirmed that he had not invoked his right to counsel. (There is no dispute that petitioner had not been appointed counsel at the time that the statements were made.) Petitioner acknowledged that in his own declaration he admitted that his counsel had asked him whether he "had requested an attorney being present during my custodial interrogation" and that petitioner "informed him [counsel] that I had not." 9/21/01 Tr. 17-18; see also id. at 18 ("What my attorney asked me is whether I had asked for an attorney. And I had not, no, not specifically."). After the hearing, the government argued that, although a "factual finding about what [petitioner] said (or did not say) following the reading of his rights" was necessary, the testimony established that petitioner could not show that he invoked his right to counsel. Gov't Response to Castro's Pro Se Supplemental Br. 2. Rather, petitioner's decision to speak to the officers after being made aware of his rights through Miranda warnings constituted a waiver of his right to counsel. Cf. North Carolina v. Butler, 441 U.S. 369, 373, 376 (1979) ("defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver" can be sufficient to support a finding of a waiver of Miranda rights; "explicit statement of waiver is not invariably necessary").

Petitioner argued below that courts must presume that a defendant did not waive his rights absent an express statement that he is willing to talk to the officers. Pet. Br. to U.S. Mag. Court at 7 (Oct. 17, 2000). But petitioner's actual engagement in discussion with the officers, after being made aware of his rights, provides sufficient evidence of a waiver. See United States v. Posadas-Rios, 158 F.3d 832, 866-867 (5th Cir. 1998) ("[a]s long as the police administer Miranda warnings before proceeding, a defendant's voluntary decision to answer questions without claiming his right to have a lawyer present to advise him constitutes a `knowing and intelligent' and therefore valid, waiver of his Sixth Amendment right "), cert. denied, 526 U.S. 1031, 1080, 1137 (1999); United States v. Chong, 829 F.2d 1572, 1574 (11th Cir. 1987) ("if after being advised of his rights an individual responds willingly to questions without requesting an attorney, waiver may be implied"). Petitioner therefore cannot support his claim that his statements should have been suppressed under the Sixth Amendment or that counsel was ineffective in failing to move to suppress them.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

MICHAEL CHERTOFF
Assistant Attorney General

NINA GOODMAN
Attorney

DECEMBER 2002